

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED SCRAP METAL, INC.

and

Case 13-CA-268797

JESUS CASTILLO, AN INDIVIDUAL

UNITED SCRAP METAL, INC.

and

Cases 13-CA-270367
13-CA-272406

ALEJANDRO CASTILLO, AN INDIVIDUAL

Lisa Friedheim-Weis, Esq., for the General Counsel
Brad Wartman and Peter Andjelkovich, Esqs.
(Peter Anjelkovich & Associates), Chicago, Illinois

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried remotely by virtual Zoom technology on October 12, 13 and 28, 2021. The amended complaint¹ alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act)² by its responses to a mass employee walkout on April 28, 2020³ over dangerous work conditions due to the COVID-19 pandemic. The allegedly unlawful conduct consisted of: (1) threats to employees of less opportunities to work extra hours; (2) restrictions to their ability to communicate with each other, and take photographs and videorecord working conditions; and (3) imposing more onerous working conditions on Alejandro Castillo, the leader of the walkout, and disciplining him under the newly imposed overly broad restrictions. The Respondent denied the material allegations, asserting it would have taken the same action taken even in the absence of the alleged protected activities.

¹ The amended complaint refers to the First Amended Consolidated Complaint, as amended on September 23, 2021.

² 29 U.S.C. §§ 151-169.

³ Unless otherwise stated, all dates refer to 2020.

On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

5

FINDINGS OF FACT

I. JURISDICTION

10

The Respondent, an Illinois corporation, is a full-service recycling company and recycled materials provider. Annually, the Respondent sells or ships goods valued in excess of \$50,000 directly to points outside the State of Illinois. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

15

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

20

The Respondent's sole facility is located in Cicero, Illinois where it recycles and sells various recycled materials. The Respondent employs approximately 165 hourly employees assigned to three daily shifts. A typical workday is eight hours. There are multiple different departments to which employees can be assigned. Some employees are assigned to perform work inside or outside. It is also common for employees to work in extreme heat or cold depending on the time of year. In several departments, employees operate heavy machinery, including forklifts, and are required to lift heavy materials, including wooden pallets. Between 25 130 and 200 trucks enter and leave the facility daily.

30

Employees' terms and conditions of employment are embodied in the Employee Handbook provided to employees when they are hired. The overtime provision states that '[h]ourly employees will be paid "time and one-half" of their regular hourly rate for authorized hours worked in excess of forty (40) in one week.' "Prohibited conduct" or "misconduct" in the workplace "which can lead to disciplinary action, up to and including termination of employment," includes unexcused or excessive absenteeism, interfering with fellow employees' ability to perform their job, interfering with fellow employees' ability to perform their job, deliberate neglect of duty, and insubordination/ disregard of a supervisor or manager's 35 instruction. The Disciplinary Action Procedure states:

40

If your performance, attendance or conduct falls below standard, it is necessary to consider the facts and circumstances of the individual case to determine what discipline is warranted. Generally, in the case of a minor violation of rules, you may be spoken to and warned verbally. This conversation may be documented but it is considered a "coaching" session. Continued violations or continued performance deficiencies may result in further disciplinary action, up to and including termination of employment.

⁴ The Respondent's motion to strike the Counsel for the General Counsel's post-hearing brief, filed January 7, 2022, is denied as an unauthorized submission of a reply brief.

The Company's progressive disciplinary action system is as follows, pertaining to each instance of a policy violation:

Step 1: Documented coaching

Step 2: Written Warning

Step 3: Suspension

Step 4: Termination

When misconduct is of a very serious nature, management has the right to skip steps; in other words, the level of disciplinary action may be escalated as to match the severity of the conduct. Additionally, you may also be immediately discharged without prior warnings. While not all-inclusive, the following are examples of serious misconduct that may result in immediate discharge:

- Violating the Zero Tolerance Drug / Alcohol Policy
- Dishonesty
- Unexcused or excessive absenteeism
- Unexcused or excessive tardiness and/or early departures
- Fighting, threatening, instigating or coercing a fellow employee
- Interfering with a fellow employee's ability to perform his/her job
- Theft
- Sleeping on the job
- Deliberate neglect of duty
- Insubordination/disregard of a supervisor or manager's instruction
- Immoral conduct or indecency
- Falsification of Company records or willful destruction of Company property
- Unauthorized disclosure of confidential information
- Sale, possession or use of illegal drugs or narcotics
- Serious violation of the Company's Respect in the Workplace, Prohibited Conduct, or Harassment policies
- Serious violation of Company safety policy

Each employee is responsible for knowing the Company's conduct expectations as well as the procedures outlined in this manual. If you should have any question about the application of any rule or discipline you have received, you should discuss it immediately with your manager or HR representative.

Employees are also required to adhere to the "Attendance and Unplanned Absences" policy. Disciplinary action, including termination, may result from more than "three (3) unexcused, unapproved absences within a year, or a consistent pattern of absenteeism." Tardiness or leaving early on two occasions within a 60-day period is tantamount to an absence. Excessive absenteeism, lateness or leaving early may lead to discipline, up to and including, termination of employment. Additionally, an employee "who fails to report to work for his/her scheduled shift and does not call to report this absence an hour prior to the start of his/her shift time may be disciplined, up to and including termination of employment. Finally, an employee "who fails to report to work for his/her scheduled shift and does not call an hour prior to the start

of his/her shift time to report this absence for 3 consecutive days will be considered to have voluntarily resigned.” The process for excused absences is explained as follows:

Occasionally, however, it may be necessary for you to be absent from work. USM is aware that emergencies, illnesses or pressing personal business that cannot be scheduled outside of your work hours may arise. If you are unable to report to work, or if you will arrive late, please contact your direct supervisor or manager immediately. If you are unable to call in yourself because of an illness or emergency, be sure to have someone call in on your behalf. You will be provided contact information in the event of an unplanned absence. Employees are expected to call one hour prior to the start of their shift. Failure to do so may be considered a “No Call/ No Show” (see details, below). If your supervisor or manager is not available when you call, you may leave a message on the Human Resources Department voicemail at 708-780-5311.

More than three (3) unexcused, unapproved absences within a year, or a consistent pattern of absenteeism, will be considered excessive and may result in disciplinary action, up to and including termination of employment.

Although essentially prohibiting employees from distracting coworkers or neglecting their duties, there is no written policy in the Employee Handbook, or otherwise, prohibiting or penalizing employees for taking photographs or videorecording in the workplace. Nor are employees prohibited from talking to coworkers during work time about nonwork-related matters. In fact, prior to September, employees regularly conversed during work time about personal and social matters. In addition, except when employees are operating a machine,⁵ they are not prohibited from communicating with each other by cellular telephone.⁶

Joseph Cuevas has been the facility’s General Manager for about ten years. Jennifer Quinn Morales is the Human Resources Director. David Lopez, a statutory supervisor, manages the wire processing shop.⁷ Additional supervisors include Jordan Mitchell and Edgar Hernandez.

Jesus Castillo has worked in the wire processing shop for over six years as a mobile equipment operator separating cables from aluminum and copper. His regular shift is eight hours daily, Monday through Friday. In addition, Jesus Castillo typically works an overtime shift on Saturday. Prior to April 28, he was frequently assigned to work more than eight hours per shift. Jesus Castillo is directly supervised by Lopez.

Alejandro Castillo, Jesus Castillo’s father, was assigned to the wood department for over six years. There, he separated wooden pallets and scrap wood from metal. The pallets would be

⁵ Although not found in the Employee Manual, it is undisputed that the Respondent had a policy prohibiting the use of cellular telephones while operating a machine. (Tr. 191, 203-05.)

⁶ It is also undisputed that, prior to September, employees were not prohibited from taking photographs or talking with each other in person or by telephone. (Tr. 37, 392-93.) Not surprisingly, however, lengthy personal conversation during worktime or distracting coworkers has always been frowned upon. (Tr. 327-28, 443-44.)

⁷ Lopez served with distinction in the military and continues to served his community in various capacities. His dedication as a supervisor for the Respondent is no different. Much of Lopez’s testimony, however, followed leading questions, and I found him less than credible on several issues. (Tr. 291-95.)

stacked, lifted by a forklift, bobcat or similar equipment, and carried to a trailer for resale. Prior to April 28, he was also responsible for stacking and loading pallets from piles generated by the nine other departments. Also prior to April 28, Alejandro Castillo worked with two to five other employees in the wood department; the other employees sorted wood from metal, while he operated a forklift or similar equipment to lift, carry, and dump the sorted materials.⁸ Prior to June, Alejandro Castillo was supervised by Lopez.⁹

Prior to the walkout, Alejandro Castillo had been disciplined five times. On July 6, 2015, he was coached for using a cellular telephone and not wearing a seatbelt. On July 21, 2015, Alejandro Castillo was coached another safety violation, this time failing to wear safety glasses. On December 26, 2015, he was coached regarding attendance after not calling or showing up to work. On September 11, 2017, Alejandro Castillo was issued a written discipline for another attendance infraction after failing to call-in one hour prior to his shift. On October 23, 2017, he was suspended for one day for failing to wear his seatbelt.¹⁰

B. The COVID-19 Pandemic

In the initial months of the COVID-19 virus pandemic, the Respondent remained fully operational with no change to employee schedules. Despite the fact that there were over 100 employees working at any given time, the Respondent did not implement basic protective measures such as increased sanitization, temperature checks, or personal protective equipment (PPE). During this time, Cuevas told groups of employees in multiple departments that the facility would remain open because they were “essential,” the virus was essentially just another form of influenza, and only presented a danger to persons with cancer.¹¹

On April 27, Alejandro and Jesus Castillo learned that a coworker and close friend, Reynaldo Rodriguez, passed away due to COVID-19. Alejandro Castillo became very upset and decided to organize a mass employee walkout the next day to demand the Respondent implement health and safety measures for employees against COVID-19.

⁸ I credit Cuevas’s unrefuted testimony that the assistance depended on the workload. Once the other employees were done assisting, they returned to their regular assignments. (Tr. 90-91, 339, 342-43, 373, 408, 427.)

⁹ I credit Alejandro Castillo’s testimony over that of Cuevas that Lopez supervised him prior to June, when Cuevas assumed direct supervision of Alejandro Castillo. (Tr. 70-72, 91-93, 407-08.) Whether Cuevas or Lopez supervised Lopez prior to June is a question that does not neatly fit the facts. Cuevas ran the entire facility, not a department. Lopez supervised the wire processing shop. Alejandro Castillo worked in the wood shop. Based on those record, I find that it unlikely that Cuevas’ directly supervised Alejandro Castillo. Prior to June, Alejandro Castillo collected wooden pallets in the wire shop, as well other departments. Moreover, while Lopez testified credibly regarding Alejandro Castillo’s distracting forays into the wire shop, he did not refute Castillo’s contention that he supervised him until June. (Tr. 305-06.)

¹⁰ Jt. Exh. 4.

¹¹ I credit the detailed testimony of Alejandro and Jesus Castillo on this issue over Cuevas’s denial, which responded to a leading question. (Tr. 21-22, 72-73, 393-94.)

C. The April 28 Walkout

The next day, April 28, Alejandro Castillo arrived at the facility at 5 a.m., an hour before the start of his shift. Over the next hour, he spoke with about 15 third shift employees about demanding that management provide better protection against COVID-19. He also urged them to return to the facility at 9 a.m. in order to join first shift employees in a mass walkout. Alejandro Castillo then held a similar discussion with first shift employees prior to the start of his shift.

At about 9:00 a.m., approximately 85 first shift employees walked out of the facility and gathered in front of the Human Resources Department. Jesus Castillo, who was not feeling well, arrived around that time after getting tested for COVID-19. However, he maintained some distance from the group. Quinn Morales was not at the facility that day.

Televised media was present and interviewed Alejandro Castillo and other employees. Some employees also photographed and videorecorded the event.¹² At some point during the walkout, Arise Chicago, a labor organization, arrived and provided the striking workers with a petition to sign. Jorge Mujica, an Arise Chicago representative, read the petition, which was written in English, in Spanish to the employees. The petition demanded more PPE, paid-time off for required quarantines, and assurances that employees not be disciplined for engaging in the walk-out. Approximately 74 employees signed the petition.¹³

During the walkout, which lasted until about 5:00 p.m., Cuevas went outside several times and insisted the employees return to work. Alejandro Castillo refused and said the group wanted to present a petition to management. After Cuevas told him to stop yelling, Castillo recited the employees' demands, including two-weeks paid time-off to quarantine while the facility was sanitized, and improved working conditions for employees thereafter. Those measures included PPE, disinfectants, social distancing, and paid time-off to isolate as needed. Cuevas told the employees there was nothing the company could do, and urged them to return to work because they were essential workers. Alejandro Castillo rejected the request, telling Cuevas they could not return because of the contagiousness of the virus. Consistent with the demands laid-out in the petition, Alejandro Castillo insisted the facility needed to be shut down, sanitized, and employees quarantined. Cuevas reiterated that the facility could not close. During this conversation, Alejandro Castillo was shouting, although later he and Cuevas had a "tranquil" conversation. At some point, Jesus Castillo overheard Cuevas say over his walkie-talkie that Alejandro Castillo was responsible for the walkout.¹⁴

¹² Quinn Morales saw social media posts of the walkout. (Tr. 445.) However, no photographs or videos were offered into evidence.

¹³ Alejandro Castillo testified that Cuevas signed the petition when presented with it. Since his signature was not on the petition, however, it is likely that Cuevas signed some other document acknowledging receipt of the petition. (Jt. Exh. 2; Tr. Tr. 85-86, 211-14, 405-06.)

¹⁴ I do not credit the inconsistent testimony of Alejandro and Jesus Castillo that Cuevas' threatened employees with termination if they did not return to work. I do, however, credit Jesus Castillo's testimony that he heard Cuevas, who conceded being "shocked" over the walkout, yell out that Alejandro Castillo was at fault for the walkout. Cuevas did not deny making that statement. (Tr. 27-31, 42-45, 79-86, 188-89, 259-63, 317-18, 403-06.)

That same day, Jesus Castillo tested positive for COVID-19. He quarantined and was out of work until May 18. The next day, Alejandro Castillo tested positive for COVID-19. He too quarantined and did not return to work until May 27.

5

D. Changes After the Walkout

In response to the April 28 protest, the Respondent's owner informed employees on May 1 that the facility would be disinfected, employees' temperatures would be provided with face masks, have their temperatures taken upon arrival, and paid while quarantining. If they tested positive for COVID-19, the Respondent would continue to help them. The Respondent immediately implemented these measures. Also, at Alejandro Castillo's request in a separate text message to Cuevas, the water fountain was moved from the restroom to outside it.

10

Operations were also restructured to facilitate social distancing. Work start times were staggered to reduce the number of workers present. Each department was now required to stack its collection of wood pallets and send scrap pallets to the dock area, where the material would be loaded onto trailers for sale. Prior to the walkout, the wood shop would transport stacked wooden pallets from each shop to the trailers.¹⁵

15

20

E. Lopez's Threat to Deny Jesus Castillo Extra Work Hours

By the time Jesus Castillo returned to work on May 18, Lopez knew that he attended the walkout. He informed Jesus Castillo that there was going to be a change for those who participated in the walkout. "You're only going to work eight hours. For those who did this you will work more hours."¹⁶ At that point, Lopez reassigned Jesus Castillo to work outside. Over the next four months, Jesus Castillo worked eight-hour shifts, Monday through Saturday; he was not, however, offered extra work hours.

25

30

Around September, Castillo met with Lopez again and requested more hours because he was struggling financially. Lopez denied the request and attributed the reason to Jesus Castillo's attendance at the walkout. He added that he was replied that he was only giving increased hours to new hires and employees who did not participate in the walkout.¹⁷

¹⁵ I based this finding on Cuevas's plausible explanation as to why schedules were staggered in order to facilitate social distancing. (Tr. 390-92.) Alejandro Castillo, on the other hand, presented no factual basis for his assertion that the Respondent modified shifts in retaliation for the walkout. (Tr. 219-22.)

¹⁶ The context of Jesus Castillo's credible testimony indicates that he misspoke when testified that Lopez said that those who participated will get only eight hours *and* then says that "those who did this" will also "work more hours." Considering the record as a whole, it is clear that Jesus Castillo intended to say that those who did *not* participate in the walkout would get more hours. (Tr. 33.)

¹⁷ Notwithstanding the confusion over his schedule, I based this finding on Jesus Castillo's credible and unrefuted testimony, corroborated by the subsequent lack of extra work hours offered to him, and his relocation to perform outside work. (Tr. 32-34, 56-58, 65-66.) Lopez's denial that he made the statement or of any connection between the walkout and the sudden disappearance of extra work for Jesus Castillo was unconvincing. His short-circuited, inconsistent testimony as to his knowledge of Jesus Castillo's presence at the April 28 protest, along with his denial in response to a leading question on this issue, rendered his testimony unreliable. Moreover, Lopez testified that extra hours were only being offered to night shift employees because there were less workers on that shift. However, he failed to explain why he

F. Alejandro Castillo's Work Changes

(1) Changes to Alejandro Castillo's Work Duties

In accordance with the Respondent's restructuring of operations, Alejandro Castillo's working conditions changed after returning to work on May 27.¹⁸ He was no longer responsible for separating and stacking the wood of nine different departments. Now, Alejandro Castillo only received roll-off loads. Each shop now separated its wood materials and Alejandro Castillo only received roll-off loads. His workload decreased by approximately 50 percent. However, he was no longer provided with additional staff to assist him in the wood shop. As a result, he was required to get on and off the forklift repeatedly in order to stack the materials before transporting and dumping them into to a trailer. He subsequently made several requests for more help but was denied.¹⁹

(2) Assignment to Work Outdoors

On June 27, the temperature was over 100 degrees during the workday. Like the other trailers in the facility, the temperature in the trailer that Alejandro Castillo was unloading was very hot. At some point, Alejandro Castillo felt unwell and text messaged Quinn Morales for help because the work was too much for one person. None was provided.

On June 29, Cuevas and Quinn Morales met with Alejandro Castillo, and issued a written coaching "to better understand why production levels are down in the wood processing area. We need to understand what is going on. We are asking these questions based on your documented production. 1) Production is 30% less than the baseline – why?" Alejandro Castillo left the meeting to attend to a personal matter and the meeting spilled over to the next day. Quinn Morales read the coaching document Alejandro Castillo ultimately refused to sign, on July 1:

Translation of Coaching document /conversation between Joe/Jennifer and Alejandro Castillo.

- On 6/27, Alejandro send a text to Jennifer and Joe, saying he wanted a helper because the work was a lot for one person
- On Monday, 6/29, there was a meeting between Joe / Alejandro / Jennifer to talk about the text and better understand the "wood pile" problem
- We could not continue the conversation because Alejandro had to leave at 5:45pm
- So, Joe and Jennifer went to the wood pile on 6/30 to talk to Alejandro and look at the situation
- Alejandro did not want to sign if it wasn't translated to Spanish. Joe said, "Jennifer will do it and we will come back tomorrow."

did not offer night work to Jesus Castillo when he asked to work extra hours. (291-92, 296-302, 306-09.)

¹⁸ There is no assertion that this move was not based on a legitimate business purpose.

¹⁹ While I rely on Cuevas's estimate that Alejandro Castillo's workload decreased by about 50% after May, I do not credit his denial that Castillo's request for help was refused. (Tr. 341-43, 372-73, 395-96, 408, 427.) While much of Alejandro Castillo's testimony was longwinded and unresponsive, it also revealed that he is not one to hold back a request for help. (Tr. 91, 206-09.)

- The coaching was to review the following:
 - [This is crossed out]: Alejandro worked alone in the wood pile for years and there was not a problem. [Handwritten] Stricken – Jennifer misunderstood “for years” – JQ
 - When he [Alejandro] was not there, another person was alone and had the ability to do 3 times as much production
 - This was just a “coaching” (conversation) to talk about solutions / help
 - Joe said, “This is my homework” – meaning he will train the shipping guys to load the van trailer in much more organized way. [Handwritten] – Tuesday 7/7/20 – JQ
 - But besides the solution with the people in shipping, the job is going to stay the same as always
 - [Handwritten] Expectation – one load every other day – after the training. - JQ

Besides this issue with the wood pile, Joe also reviews the parking rules – Alejandro, on Saturday, you parked in a place that is not legal per Cicero and also this is not safe. Please, you need to park like everyone else, in the employee parking lot or on Cicero Ave.²⁰

On July 2, Castillo received written discipline for “[f]ailure to punch the time clock (missing punches), punching out late for lunch.” On August 15, Castillo was suspended for one day for “[e]ntering the facility without PPE; improperly filling out daily production and inspection reports.”

One day in August, Alejandro Castillo developed a sore throat. Believing toxic gases and metals to be the cause, he complained to Cuevas. Cuevas, however, told Alejandro Castillo to get tested for COVID-19. Alejandro Castillo then he took photographed and videorecorded his workspace to send to the Occupational Safety and Health Administration (OSHA).

(3) Assignment to Light Duty Work

On August 31, Alejandro Castillo suffered a leg injury while getting off the bobcat. After Cuevas gave him the applicable forms, Alejandro Castillo was seen by a company doctor. He was diagnosed with a left knee sprain and prescribed two weeks of physical therapy. Alejandro Castillo was also given a doctor’s note permitting him to return for light duty work, specifically, seated work, standing only ten minutes per hour, and limited to ten-pound lift restrictions.²¹

On September 1, Alejandro Castillo returned to work. After giving Quinn Morales his doctor’s note, Quinn Morales instructed Alejandro Castillo to return to the wood department to perform his regular work duties. He objected to the assignment because his leg injury prevented

²⁰ The Respondent contends that a coaching is not discipline and is only meant to document conversations, help employees better understand company policy or teach them to do things better. That is incorrect. Coaching sessions are documented on Disciplinary Action Forms, are placed in employee files, and are the listed in the Employee Manual as the first level of the progressive disciplinary process. (R. Exh. 22-24; Tr. 93-98, 325-27, 360-61, 364-68, 370-78, 410-12, 428-32, 444-45, 452-61, 486.)

²¹ GC Exh. 5-6.

him from climbing onto a forklift or bobcat, and insisted he be assigned to “light duty.”²² After Quinn Morales reiterated her instruction for Alejandro Castillo to report for regular duty, he text messaged Cuevas regarding his inability to climb onto the bobcat. As he proceeded to his work area, he spoke to Lopez and Mitchell, and explained to them that he had a light duty work note.

5 Alejandro Castillo further explained that it would be dangerous for him to operate a bobcat under the circumstances, and he would file an OSHA complaint if ordered to do so. Lopez and Mitchell immediately brought him back to see Quinn Morales. At that point, he was assigned to shred papers while seated under a covered area. Shredding was a form of light duty that the Respondent assigned Alejandro Castillo to perform when he was injured about five years earlier.
10 He was told he would be working under Mitchell shredding paper.

Alejandro Castillo continued shredding until lunchtime. When he returned, however, Cuevas directed him to go to Area 16, an aluminum sorting section, which is open and uncovered, with no heat or air conditioning. There are two 20-foot high, 30-foot-wide doors that
15 are always open with forklifts going in and out. He was given a table and chair, which were placed in the middle of the area, just outside a supervisor’s shack. Very large concrete blocks were stacked about ten feet high, and the table was positioned at least 15 feet away. Materials were brought in with a bobcat, placed into a dumper, and then dumped on the table. At the table, Castillo separated aluminum from wood, and removed steel clips with a magnet. Once
20 separated, a forklift removed the materials from the area. Other workers were also working in the area at the time. Placing the light duty job in the building would not have been efficient, as the materials would have had to be transported an additional 100 yards.²³

Although September 1 started as a dry day, it began raining at some point. This was not
25 an unusual occurrence for Castillo, as he regularly worked outdoors, rain, snow or shine. When Castillo complained on this occasion, Cuevas provided him with a raincoat and hat, and Castillo worked without a quota at his own pace. Other employees were also working outside in the rain at the time.²⁴

30 On September 2, Hernandez assigned Alejandro Castillo to work alone outside in an enclosed area cleaning cement blocks. He was supplied with a table and chair. The area was regularly used by semi-truck drivers to unload materials and machines to lift and transport those materials in and out of that area.²⁵

²² The Respondent contests Alejandro Castillo’s credibility regarding his abilities on September 1 because the highest level that he had to climb came up to his chest. It is not disputed, however, that he had a knee sprain and could not bend the knee. (Tr. 106-09, 227-28, 392.)

²³ Castillo’s vague assertions that it his work area was unsafe was not credible. He expressed concern over the possibility that a machine could knock one of the blocks onto him. However, he provided no details as to how close he was to the blocks and whether any machines did, in fact, operate in close proximity to him. (Tr.123.) Photographs of the area and approximate positioning of the table and chair show that Castillo was working in a big space and had more than enough room to move further away from the blocks if he desired. (R. Exh. 17a-c; Tr. 380, 383, 387, 462-63, 838.)

²⁴ I credit Cuevas’s testimony that Castillo completed the recycling assignment by lunchtime. Moreover, nothing in his work restrictions prevented him from working in the rain. (Tr. 113-15, 223-29, 270, 378-80, 431.)

²⁵ I credit Castillo’s unrefuted testimony that he complained to Hernandez that he would become “mashed potatoes” if one of the cement blocks fell on him. (Tr. 115-17, 122-23.)

*(4) Threatened Discipline for Violating the No-Talking Rule**G. Alejandro Castillo's September 2nd Meeting*

At the end of that day, Alejandro Castillo was called into a meeting with Cuevas, Quinn Morales, Hernandez, and Mitchell for another coaching. At the meeting, he was read a document titled "Coaching and Expectations Clarification." The document was written in English but read by Quinn Morales to Alejandro Castillo in Spanish:

- Company policy dictates that you need to perform work when punched in the clock and while working-you cannot conduct personal business during this time. Some team members have come forward to express discomfort that you are talking to them about non-work-related matters when you are supposed to be working. Failure to do so is considered a serious violation of company policy.
- Respect In The Workplace - an incident occurred where you demanded Joe give you a rain coat and then demanded that he "cannot watch you". No one is "watching you" outside of the normal supervisory role. You need to conduct yourself in accordance with our Respect In The Workplace policy. Any company leader can instruct you to follow company policy whether Covid-19, safety or anything that you have signed off on in our company handbook. We ask that you cooperate and speak and act per our training guidelines. Failure to do so can be considered a violation of the Company's Core Values/ Respect In The Workplace policy.
- You have made a number of general claims of discrimination. If you have a complaint substantiated by facts, you are welcome to document the date, time and nature of the incident or tell us this specific information. USM will investigate and get back to you.
- FMLA - we have asked you to cooperate with our FMLA procedures. Your due date for turning in documents for your medical condition was 8/18. We ask that you turn this in no later than 9/11 at 8am.
- Restrictions and your work injury- you asked me in an email why you changed roles, per the restrictions your doctor gave you. Jordan and I explained this to you - Joe is your supervisor. However, he was performing inventory. Jordan explained you would perform one accommodated role until Joe could figure out where best to place you; when he was done with inventory, he moved you to 16th street, as Edgar needed support. You will receive instructions from any company leader whether that be Joe, Edgar or J. Carlos.
- You are sending me numerous emails and I want to clarify my schedule. When you write an email, it may take a little while to get back to you. I am involved in meetings, performance reviews, disciplinary actions, training sessions and other activities to support all of our team members. I ask you to be understanding in that I cannot respond to you the minute you write me. I have to support all of our team member requests equally across the board.
- You mention in an email that I am to write a "report" – I do not know what you mean. I need you to explain please. *He clarified re Jordan/my conversation – included here JQ*²⁶

²⁶ Quinn Morales' handwriting.

You wrote via email that, "It is not fair that Joe put me in the rain"; You said Jordan is my supervisor"; "Remember I have an appointment" and something about Uber/taxi -to all of these I am clarifying:

- 5 • Joe put you in a position to respect the restrictions stated by the doctor. Our work is inside/outside. You were given a raincoat. You worked outside just the other team members on 16th Street because that is where we needed your support and were able to accommodate your restrictions.
- 10 • We never said that Jordan was your supervisor. We explained that Joe was in inventory. Jordan was temporarily handling the job accommodations while Joe was busy. When Joe left inventory, he directed you to your new area. We understand that you have made a request to change supervisors. We acknowledge the request but cannot do so at this time.
- 15 • You need to comply with company injury protocol. IL state does not mandate that an employer pay for transportation. You are responsible for transportation to and from visits. You will be compensated for your normal hours; appointments may be scheduled outside of your working hours and do not have to be compensated by law.
- 20 • Bobcat email - don't understand what you sent - can you please elaborate?
- Personal calls - we cannot field personal multiple personal calls due to the nature of our business. Today we had two calls for you and have passed on messages to you. We ask that you instruct others to limit calls to the front office.²⁷

25 At the conclusion, the form said it was read to Castillo in Spanish. The document was signed by the four company representatives. Castillo, however, refused to sign it. He was informed that the meeting was "a way of training kind of like a coaching." Prior to that date, he had never been called for a coached or otherwise disciplined meeting for talking with or distracting coworkers.²⁸

30 The meeting lasted a half hour to 40 minutes It involved calm, normal conversations. Alejandro Castillo did not deny speaking with coworkers about non-work-related matters. He did ask, however, why the policy applied to him and not everyone else.²⁹

H. September 2 Meeting with Management

35 On September 2, Quinn Morales and Cuevas also met with 15 to 20 employees in their work area. At the meeting, Quinn Morales announced a new policy prohibiting employees from using cellular telephones to speak with coworkers about no-work matters, take photographs or videotape after punching-in because to do so was like "stealing from the company." She also warned that violators would have their cellular telephones confiscated and be written-up. One

²⁷ Jt.. Exh. 3.

²⁸ Cuevas conceded that Alejandro Castillo had never before been called for a coaching meeting for talking with or distracting coworkers. (Tr. 415-16.)

²⁹ Castillo's rambling testimony was confusing. Fraught with inconsistencies, much of his testimony regarding this event presented a significantly different picture from the sworn allegations in his Board charges and affidavits. (Tr. 114, 118, 191-201.) On the other hand, I did not credit the claims by Quinn Morales and Cuevas of uncorroborated complaints of unidentified coworkers that Castillo caused them discomfort when talking to them about unspecified nonwork-related matters. (Tr. 325-30, 448-50.)

employee asked if they could still talk about soccer. Cuevas shook his head to indicate they could not.³⁰

J. Alejandro Castillo's December 4 Coaching for Inefficient Work Performance

On December 4, Cuevas and Quinn Morales coached Alejandro Castillo regarding his attendance and job expectations. Castillo was admonished for failing to follow the attendance protocol by providing two weeks' notice for time off to take his wife to appointments. Regarding the job expectations, they addressed his inefficient production and outlined several requirements – only using the bobcat to transport more than 50 pounds, manually stacking the pallets if less than 50 pounds, replacing the forks with a bucket to remove scrap wood and other garbage, and ensuring that only wood was placed in the wood pile. On the last point, it was noted that this was not done on numerous occasions and resulted in increased cost and a losing a vendor.³¹

K. December Written Warning Issued to Alejandro Castillo

On December 17, Castillo attempted to serve Quinn Morales with a copy of the Board charge in Case 13-CA-270367. The charge alleged 12 wide-ranging coercive and discriminatory actions taken against Castillo over the previous six months.³² Later that day, at the end of shift, Quinn Morales called Castillo into her office and handed him a written discipline listing four instances of misconduct. She read it to him in Spanish. Cuevas was also present. The notice listed policy violations occurring on December 9, 11, and 12. The first involved “[d]istracting coworkers from performing work” on December 9. The second was for failing to follow the attendance protocol on December 11. The third was for using a cellular telephone in the work area on December 12. The fourth was for the unsafe use of a bobcat “by travelling a distance with load elevated” on December 12.

During the discussion that ensued, Quinn Morales and Cuevas addressed all but the attendance protocol violation. Regarding the charge that Castillo distracted others on December 9, Quinn Morales based that her observation of Castillo speaking to two employees in the wire processing shop, while Cuevas’ derived the same information from Lopez. In the past, Lopez told Castillo to move on whenever he noticed him conversing in his department. On this occasion, however, he bypassed any discussion and reported the incident to Cuevas.

Quinn Morales also showed Castillo a videorecording showing him speaking with Jesus Castillo in an area close to Cuevas’s office. They explained that he spent a long period of time standing around outside his work area speaking to wire processing shop employees Turcios

³⁰ I based this finding on Jesus Castillo’s testimony. He failed to mention such statements in his Board affidavit. Cross-examination over the affidavit suggested, however, that the meeting did in fact take place. Notwithstanding the General Counsel’s efforts to establish that the ban covered all forms of non-work discussion, Jesus Castillo’s detailed testimony referred only to communications by telephone, as well as photographing and videorecording. (Tr. 35-37, 45-47, 60.) Cuevas and Quinn, on the other hand, responding to leading questions, had no recollection of such a meeting. (Tr. 319-21, 447-48.)

³¹ The Respondent’s concerns, as expressed in the coaching document, are not disputed. (R. Exh. 25.)

³² Quinn Morales’ testimony that she did not recall Alejandro Castillo attempt to serve her with the charge was not credible. She conceded that he attempted to hand her an envelope. (Tr. 125-26, 479.)

Fredis and Jesus Castillo. Castillo disputed the accusation that he was out of his work area at the time and explained that he was headed to Cuevas' office to turn in a required work report. He added that he performed very tiring, heavy-duty work and, as a result, he took two or three-minute break every 15-20 minutes. Castillo also insisted he was merely talking to other employees like he and other employees always did and was being retaliated against for organizing the April 28 walkout.

The texting violation related to a message sent by Castillo to Quinn Morales on December 12 while he was operating a bobcat. Quinn Morales immediately informed Cuevas, who reviewed the videorecording. Cuevas observed Castillo send the message to Quinn Morales while sitting on the equipment while it was operational. Although the bobcat was not moving, he could tell that it was on light on top of the machine was on.

The company's policy was due to the dangers posed by using a cellular telephone when operating heavy machinery in an industrial area. A lack of attention can lead to serious accidents, including death. Despite these dangers, Castillo claimed that the violation for using the telephone while operating the bobcat was unfair because he needed to communicate with management and a coworker who was bringing him semi-loads. He did not say that the machine was off or that he requested a radio. Instead, he explained that he always communicated with Quinn Morales by walkie-talkie, and every other driver is given one to use. On occasions in the past, Castillo had the use of a walkie-talkie. Not all bobcat drivers, however, had walkie-talkies. At the time, about ten drivers were operating a bobcat or forklift without a radio. If operators were without radios, they were to communicate through supervisors³³

The other December 12 violation was for driving a bobcat with an elevated load. Materials should be carried with a low level of gravity. When they are carried in the air, an uneven center of gravity is generated making the machine top heavy. If the machine hits an unlevelled piece of ground, the machine can topple forward or to the side resulting in the load dropping on the driver or others.

Castillo conceded the load was high. However, said he only elevated the load in order to maneuver around a pile of materials in order to stack the wood. Cuevas did not agree. He told Castillo the maneuver was not required there were two stacks of pallets that he could have moved to create a clear path to his load.³⁴

As the meeting concluded, Quinn Morales asked Castillo to sign the report acknowledging receipt. He refused. Quinn Morales then warned that Castillo faced suspension if he did not sign it. Then she told him he was a "bad element to the company." At home, after a

³³ I do not credit Castillo's testimony that the bobcat was turned off. He failed to mention that at the meeting, presumably because he was shown the videorecording depicting the light activated at the time. Nor did he provide a reasonable explanation as to why he could not turn off the bobcat and get out to call Quinn Morales. His explanation was nonsensical: "At that moment that was the only moment I had for me to call Israel to ask him to remove the trailer." Castillo did not explain why that was the only moment to place the call. Moreover, Castillo did not refute Cuevas' credible testimony that other drivers at the time did not have the use of walkie-talkies. (Tr. 190-91, 205, 234-35, 330-339, 422-23.)

³⁴ Alejandro Castillo's testimony regarding the December 17 meeting did not address Cuevas's credible explanation as to why he should have manually moved the pallets. (Tr. 126-33, 335-36.)

family member read the document to him in Spanish, Castillo signed it. Castillo wrote, however, that he signed the form under pressure.³⁵

L. January 8th Discipline

Castillo took vacation in from December 22 through January 3, 2021. During that time, another employee, Carlos Gonzalez, filled in for him. When he returned on January 4, the door on his assigned bobcat was missing, rendering it operable. Castillo asked Cuevas to have the bobcat fixed so that he could lift the wooden pallets. He asserted that it was dangerous to perform his work manually and he needed the machine in order to perform his work more efficiently. Cuevas told Castillo to note the problem in the required daily production report. Castillo did that in his production reports of January 4, 5, 6 and 7, 2021. Meanwhile, Castillo still had to manually move the wooden pallets. At no point did Cuevas tell Castillo that he could use another machine in the facility.³⁶

On January 8, 2021, Quinn Morales issued Castillo a written warning regarding his lack of productivity on January 4, 2021. The charge arose after Cuevas passed through Castillo's area and observed him leaning against a trailer doing nothing for about ten minutes. After returning ten minutes later, Cuevas found Castillo still standing by the trailer. The notice concluded with a warning any further violations of company policy "will lead to further disciplinary action, up to and including termination of employment." Castillo refused to sign the form and walked out.³⁷

M. Castillo's January 9th Injury

On January 9, 2021, the bobcat was still not repaired and Castillo had to move the pallets manually.³⁸ He was working alone. At some point, Castillo slipped in the snow and fell on his buttocks. The Respondent sent him for a medical attention to Concentra, an occupational health

³⁵ I do not credit Alejandro Castillo's testimony that he only stopped to speak with Jesus Castillo for "one or two minutes." Quinn Morales' testified that she had been watching him and then went to get Cuevas, and together they observed him conversing. That testimony was inconsistent with Cuevas's version that he was informed about the incident by Lopez. Nevertheless, Lopez credibly testified that he observed Alejandro Castillo stop to speak with Fredis for about five to ten minutes, and then Jesus Castillo for another five to ten minutes. However, neither the write-up nor Lopez or Quinn Morales refuted Castillo's credible version that his conversations with coworkers occurred while he was walking to the office file a report. Moreover, none of the other employees who Castillo stopped to talk were spoken to, much less issued coaching or other discipline. (Jt. Exh. 4; Tr. 125-32, 242-43, 271-73, 303-06, 337-339, 451-52, 484, 487-89.)

³⁶ Cuevas testified that Castillo could have retrieved a bobcat from another area, citing Gonzalez's use of an operational one the week before. However, there is no evidence that Cuevas ever told Castillo, after receiving the four consecutive daily production reports of problems with the bobcat, that he could have used another machine, assuming one was even available. Nor is there evidence that Castillo, during his time with the company, was given unfettered access to other equipment in the faculty. (Tr. 417-20.)

³⁷ The Respondent's chart containing information from production reports show that Gonzalez, during the five days that he worked in the wood section, was significantly more productive than Castillo was working more than double the amount of time. (Tr. 135, 345, 354; R. Exh. 15a, 22.) That is not surprising since Gonzalez, unlike Castillo, had the use of an operational bobcat.

³⁸ Cuevas did not dispute Castillo's testimony that the pallets, depending on how wet they are, range in weight from 15 to 90 pounds. (Tr. 133-137; GC Exh. 4.)

facility, where he complained of pain in the lower back or left hip area and left leg. Castillo was diagnosed with a lumbar sprain and cleared to return to modified work same day, with the following restrictions up to 3 hours per day: lifting up to 20 pounds, pushing/pulling up to 40 pounds, and standing and walking; sitting 50% of the time; and no squatting.³⁹

When Castillo returned to work on January 11, Quinn told Castillo that he was to return to work outside in Area 16 separating garbage and aluminum. Between January 11 and January 20, his last day of work, Castillo continued working outside in Area 16 sorting materials. During that time, he returned to Concentra on January 12 and 14. On both occasions, the doctor's reports continued the same restrictions listed on January 9. The January 14th report, however, added the following restrictions: "ADDITIONAL RESTRICTIONS AND LIMITATIONS: Please don't assign him to work in the cold for now until further notice." (caps in original). That report noted that Castillo was to return for follow-up on January 20. Castillo showed that report to Cuevas insisting he be relocated to work inside but to no avail.⁴⁰

On January 19, Castillo received physical therapy at Concentra. The therapist ordered additional physical therapy three times a week for two weeks.⁴¹ Castillo has not returned to work since January 20.

LEGAL ANALYSIS

I. THE RESPONDENT'S MAY 18TH THREAT

In determining whether a threat violates Section 8(a)(1), the Board applies an objective standard as to whether the remark reasonably tends to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark. *Divi Carina Bay Resort*, 356 NLRB 316, 320 (2010), *enfd.* 451 Fed. Appx. 143 (3d Cir. 2011); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), *enfd.* 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.*, 320 NLRB 71, 71 fn. 4 (1995), *affd.* in relevant part 111 F.3d 1284 (6th Cir. 1997); *Midwest Terminals of Toledo*, 365 NLRB No. 158 (2017). When applying this standard, the Board considers the totality of the circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

On May 18, Lopez told Jesus Castillo that he would not get extra work hours, as he regularly did before April 28, because he participated in the walkout; the extra hours were only being given to employees who did not participate in the walkout or new hires. In September, he repeated that statement when asked again by Jesus Castillo for the opportunity to work extra hours, and attributed the reason to Jesus Castillo's participation in the walkout. These threats clearly conveyed to Jesus Castillo that employees who engaged in the protected concerted

³⁹ GC Exh. 3.

⁴⁰ The Concentra records do not support Castillo's testimony as to the dates that he received physical therapy or that they recommended he not be assigned to work outside in the cold. That recommendation was issued in the January 14 Concentra report. Moreover, based on Castillo's obvious determination not to work in the cold, I have no doubt that he showed Cuevas the January 14 report precluding him from working outside in the cold because of his injury. (GC Exh. 3, 7-9, ; Tr. 138-144, 168-69.) Finally, given Quinn Morales' clear attention to detail in all of her documentation, I do not credit her testimony that she failed to notice that restriction regarding cold weather work in the January 14 report. (Tr. 479-80.)

⁴¹ GC Exh. 9.

walkout on April 28 would be discriminated against by being given fewer work hours. *Stoody Company*, 312 NLRB 1175, 1175 (1993).

Under the circumstances, Lopez's threatened reduction of work hours for employees who engaged in the April 28 walkout violated Section 8(a)(1) of the Act.

II. THE RESPONDENT'S PROHIBITION AGAINST CONVERSATIONS, PHOTOGRAPHING AND VIDEORECORDING IN THE WORKPLACE

An employer violates Section 8(a)(1) by maintaining a workplace rule that tends to chill the Section 7 activities of its employees. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In *Boeing Co.*, 365 NLRB No. 154, slip op. at 3 (2017), the Board broadened that analysis when evaluating a facially neutral rule or policy. In such instances, "the Board will evaluate two things: (i) the nature and extent of the potential impact on [Section 7] rights, and (ii) legitimate justifications associated with the rule." The Board delineated three categories of policies, rules and handbook provisions: Category 1 included rules that the Board designated as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with exercise of Section 7 rights; or (ii) the potential adverse impact on rights is outweighed by justifications for the rule; Category 2 includes rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with Section 7 rights; and Category 3 includes rules designated as unlawful to maintain as they prohibit Section 7-protected conduct and the adverse impact is not outweighed by the employer's justifications for the rule. *Id.* at 3-4.

A. The No-Talking Rule

The Board has long held that "employees have a right to discuss among themselves, and with the public, information about their terms and conditions of employment for the purpose of mutual aid and protection." *Motor City Pawn Brokers*, 369 NLRB No. 132, slip op. at 6 (2020), citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978). On the other hand, in the interest of maintaining production and workplace discipline, employers can lawfully impose restrictions on workplace communications among employees, even so far as to bar any nonwork-related conversation. However, such rules may not be imposed for unlawful and discriminatory purposes. See, e.g., *First American Enterprises d/b/a Heritage Lakeside*, 369 NLRB No. 54, slip op. at 1, fn. 7 (2020) (employer's promulgation, dissemination, and/or enforcement of a new policy prohibiting conversations other than those that are "resident-centered" in working areas, was unlawful, as rule promulgation was in response to filing of a representation petition six days earlier); *Stone & Webster Engineering Corp.*, 220 NLRB 905 (1975) (promulgation and enforcement of a rule prohibiting employee discussions adopted during organizing effort was unlawfully discriminatory).

Under the circumstances, there is no evidence that the no-talking rules – in-person and by cell phone – were imposed on Alejandro Castillo or other employees in response to the April 28 walkout, which occurred over four months earlier. Nor were there protected concerted activities or other significant developments since then establishing that the rules were imposed in order to stifle Section 7 activities. Instead, the lawfulness of the no-talking rules announced to Alejandro Castillo and a group of employees by Quinn Morales and Cuevas on September 2 require analysis under *Boeing* Category 1 – when reasonably interpreted, they ban all conversation,

including employee communications relating to their Section 7 rights during worktime. As such, the rule was unlawfully overbroad.

Under *Boeing*, the analysis does not end there. If the General Counsel meets the initial burden of establishing that a reasonable employee would interpret a rule as potentially interfering with the exercise of Section 7 rights, the Board will then balance that potential interference against the employer's legitimate justifications for the rule. The Respondent did not provide any business justification for the imposition of such a broad rule on Alejandro Castillo or any other employee. Surely, it had an interest in ensuring that neither Alejandro Castillo nor any other employee was distracting coworkers. However, such circumstances did not exist. In any event, it is one thing to tell Alejandro Castillo not to distract coworkers; it's a much wider reach to preclude him from communicating at all with coworkers about nonwork matters during worktime. Nor was there any evidence that distractions and a resulting diminution in production had somehow become rampant among the work force. The new rules, which were not contained in the Employee Handbook, eliminated a common practice condoned by management permitting employees to converse with one another while working.

Under the circumstances, the Respondent's no-talking rules announced on September 2 to Alejandro Castillo individually and again to a group of 15-20 employees, violated Section 8(a)(1) of the Act.

B. The No-Photographing or Videorecording Rule

An employer has a legitimate interest in ensuring the safety of its operations, but rules regulating the use of electronic devices must be narrowly tailored to address such concern. *T-Mobile USA, Inc.*, 363 NLRB 1638, 1641 (2016) (prohibition against recording unlawfully overbroad where rule failed to distinguish between recordings protected by Section 7 and included within its scope, recordings created during nonwork time and in nonwork areas); *Rio All-Suites Hotel & Casino*, 362 NLRB 1690 (2015) (photography and audio or video recording in the workplace are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present); *Whole Foods Market Group, Inc.*, 363 NLRB 800, 803 (2015) (employees have a Section 7 right to record in the workplace to document hazardous working conditions and unfair labor practices).

The rule at issue prohibited photographing or videorecording after employees clocked-in, i.e., during worktime. With the exception of the obvious safety considerations attendant to cell phone use while operating machinery, no rationale was provided for the overly broad ban. Like here, in *Union Tank Car Company*, 369 NLRB No. 120, slip op. at 1 (2020), the Board found unlawful a rule prohibiting the use of cell phones "during work hours or in work areas at any time unless approved by management." Member Emanuel agreed that the cell phone policy was unlawful but based it on Board precedent which "is clear that the term 'work hours' or 'working hours' means all business hours, including break, rest, and other personal times when employees are on site but not actually required to work." *Id.* at fn. 3, citing *United Services Automobile Assn.*, 340 NLRB 784 (2003), *enfd.* 387 F.3d 908 (D.C. Cir. 2004).

This case is distinguishable from recent Board decisions to the contrary. In *Argos USA LLC d/b/a Argos Ready Mix, LLC*, 369 NLRB No. 26, slip op. at 4 (2020), an employer rule

prohibiting cell phone use, the taking of photographs, and videorecording while engaged in the dangerous activity of driving a commercial vehicle was found to be lawful. In *Cott Beverages Inc.*, 369 NLRB No. 82, slip op. at 2-3 (2020), the Board agreed with the employer that its rule prohibiting cell phone use in the production area was necessary to avoid contamination of the beverage production processes and the safety of its employees in a high-traffic environment permeated by large forklifts. Here, there was no such showing.

Under the circumstances, the September 2 rule prohibiting the use of cell phones to communicate with coworkers, take photographs or videorecord in the workplace was unlawfully overbroad in violation of Section 8(a)(1) of the Act.

C. Threatened Discipline for Violating the No-Talking, Photographing or Videorecording Rules

On September 2, in the course of informing Alejandro Castillo and the group of employees of the new rules prohibiting nonwork discussion, photographing and videorecording during worktime, Quinn Morales and Cuevas warned of potential discipline if they violated the rules. Cuevas repeated the warning to Alejandro Castillo in December when he told him not to talk to others. Since the statements threatened discipline, they further coerced employees from exercising their Section 7 rights. See *Green Apple Supermarket of Jamacia, Inc.*, 366 NLRB No. 124 (2018) (employer unlawfully threatened to discipline, including discharge, employees if they supported the union); *First American Enterprises*, supra (manager unlawfully threatened to discipline employees if they violated illegal rule). Accordingly, the aforementioned threats to enforce the newly promulgated unlawful communications rules constituted a separate violation of Section 8(a)(1) of the Act.

III. THE RESPONDENT'S RETALIATION AGAINST ALEJANDRO CASTILLO

In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

To prove a violation of Section 8(a)(1) under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980) the General Counsel bears the burden of proving by a preponderance of the evidence that animus against protected conduct was a motivating factor in the adverse employment action. If the General Counsel makes a showing of discriminatory motivation by proving protected activity, the employer's knowledge of the activity, and animus against protected activity, then the burden shifts to the employer to prove it would have taken the same action even in the absence of the protected activity. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402 (1983).

Alejandro Castillo clearly engaged in protected concerted conduct in leading the April 28 walkout and acting as the employees' spokesman in demanding the Respondent implement increased safety measures to combat COVID-19 in the workplace. *Parkview Lounge, LLC d/b/a*

Ascent Lounge, 366 NLRB No. 71, slip op. at (2018), enfd. 790 Fed. Appx. 256 (2d Cir. 2019 (an employee speaking out to a group about workplace concerns is engaged in protected concerted activity). *Wal-Mart Stores, Inc.* 341 NLRB 796, 804 fn. 9 (2004), enfd. 137 Fed. Appx. 360 (D.C. Cir. 2005) (when a complaint is made to improve the working conditions of all employees it is a protected concerted activity), citing *Hanson Chevrolet*, 237 NLRB 584 (1978).

Contrary to the General Counsel's contentions, however, Alejandro Castillo did not endure adverse action upon his return to work on May 27. He complained that he was subjected to more onerous working conditions because of his role in the April 28 walkout. However, the Respondent had restructured operations after the walkout in addressing employees' concerns over health and safety, and social distancing measures were implemented. Alejandro Castillo was no exception. His workload had been reduced, although he now worked alone, and he worked outside just like he did in the past. It was very hot outside, as well as inside, just like always. When he suffered an injury in August, he was placed on light duty and placed in a separate area to work at a desk. His complaint of being forced to work in dangerous and onerous conditions in September was not supported by the evidence.

Alejandro Castillo was also disciplined for a host of rules violations eight times between June 8 and December 4. In contrast, he had been disciplined only five times in the five years preceding the walkout. Most of the discipline was classified as coaching, the lowest rung in the progressive disciplinary process. See *in re Oak Park Nursing Care Center*, 351 NLRB 27, 28–30 (2007) (“employee counseling forms” were a form of discipline because they were an “integral part of the Employer's progressive disciplinary system in that they are used to document each phase of the disciplinary process and routinely result in actual discipline”).

Nevertheless, the evidence established that the work rule violations were all legitimate. While there was a significant acceleration of disciplinary incidents in 2020, there is no evidence that Alejandro Castillo was treated in a disparate manner. Alejandro Castillo received “coaching” sessions or discipline numerous times since he organized the strike. However, clearly disturbed by the restructured operations upon his return on May 27, Alejandro Castillo’s performance and productivity diminished over time.

On December 17, the Respondent’s issued a written warning given to Alejandro Castillo for several three work rule violations. Earlier that day, Alejandro Castillo attempted to serve Quinn Morales with a copy of the Board charge in Case 13-CA-270367. While the timing is suspicious, it is simply coincidental. The list of violations detailed in the write-up were significant and Alejandro Castillo failed to credibly refute them.

On January 9, Castillo sustained another injury at work. On January 14, 2021, however, the Respondent subjected Alejandro Castillo to adverse conditions in the cold when in fact the occupational health report instructed for him to work inside due to his condition. That glaring omission was clear evidence of unlawful motivation on the part of the Respondent. Neglecting medical work accommodations after employees engage in a protected activity can show evidence of animus towards the employee’s protected conduct and result in a Section 8(a)(1) violation. *J.J. Cassone Bakery, Inc.*, 345 N.L.R.B. No. 111 (2005) (terminating employee for requesting light work accompanied by a doctor's note is an adverse action); *North Atlantic Medical Services*, 329 NLRB No. 6 (1999) (holding that the removal of an employee from light duty work and

thereafter discharging them in order to discourage union activities is unlawful).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7).

2. The Respondent violated Section 8(a)(1) of the Act on May 18, 2020 by threatening an employee with the loss of extra work hours for engaging in protected concerted activity.

3. The Respondent violated Section 8(a)(1) of the Act on September 2, 2020 by: (1) orally promulgating and implementing work rules that prohibited Alejandro Castillo from engaging in nonwork discussions with coworkers protected by the Act; (2) orally promulgating and implementing work rules that prohibited employees from using cellular telephones to speak with coworkers about nonwork matters, take photographs or videotape the workplace after punching-in because to do so was like “stealing from the company;” and (3) threatening employees with discipline if they violated the aforementioned unlawful work rules.

4. The Respondent violated Section 8(a)(1) of the Act on January 14, 2021 by imposing more onerous working conditions on Alejandro Castillo by assigning him to work outside in dangerous and arduous conditions because he engaged in protected concerted activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall order the Respondent to post a notice and mail copies of said notice to all employees employed at any time since May 18, 2020, in English and Spanish, addressing the Section 8(a)(1) violation alleged in the amended complaint.

As part of “an appropriate Order and Remedy,” the General Counsel specifically requested only that the Respondent be directed to “send a letter of apology to Alejandro Castillo for each of the independent Section 8(a)(1) violations, to be signed by Managers Cuevas and Quinn Morales on behalf of Respondent.” I decline to do that. The infringement of employees’ Section 7 rights can only be remedied with meaningful action. A remedial order can only do that if the violations are addressed by actions restoring employee’s terms and conditions that have been infringed upon and ensuring the violations do not occur again. Requiring the Respondent’s managers to tell Alejandro Castillo that they’re sorry is not the role of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴²

⁴² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, United Scrap Metal, Inc., Cicero, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and/or maintaining any rule or directive prohibiting employees from speaking to their coworkers, taking photographs or videorecording in the workplace.

(b) Threatening employees with discipline if they violate a Respondent rule prohibiting them from speaking to their coworkers.

(c) Threatening employees that they will not be assigned extra hours if they engage in protected concerted activities.

(d) Imposing onerous working conditions on employees if they engage in protected concerted activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the work rule referenced above.

(b) Advise employees in writing that the rule set forth above has been rescinded.

(c) Post at its facility in Cicero, Illinois, copies of the attached notice marked “Appendix.”⁴³ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically to all current employees and former employees employed by the Respondent at any time since May 18, 2020 by means including email, posting on an intranet or an internet site, and/or other electronic means if the Respondent

⁴³ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, or covered by any other material.

- 5 (d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

10 IT IS FURTHER ORDERED the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 18, 2022



15

Michael A. Rosas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discipline, including discharge, if you engage in protected concerted activities.

WE WILL NOT promulgate, maintain or threaten to enforce a rule that prohibits you from speaking to coworkers about terms and conditions of employment, taking photographs, or videorecording in the workplace

WE WILL NOT impose onerous working conditions on you if you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the work rule that prohibits you from speaking to coworkers about your terms and conditions of employment, or taking photographs or videorecording in the workplace. WE WILL notify you in writing that we have done this.

UNITED SCRAP METAL, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

Dirksen Federal Building, 219 South Dearborn Street, Room 808, Chicago, IL 60604-1443
(312) 353-9158, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/13-CA-268797 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street 0570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (312) 353-7170.